

June 8, 2005

Civil Division-Kent County (739-7641)

Mr. Albert G. Porach
220 E. Park Place
Newark, DE 19711

Re: **Freedom of Information Act Complaint
Against City of Newark**

Dear Mr. Porach:

Our Office received your Freedom of Information Act ("FOIA") complaint on April 14, 2005. You allege that the Newark City Council ("the Council") violated the open meeting requirements of FOIA by twice meeting in executive session on March 7, 2005 to discuss "hiring contract personnel." You allege that FOIA requires the Council "to have a public discussion of the bids received at a public meeting providing the amount of the bids and the low bidder"; to "discuss in public the qualifications of all bidders"; and to vote in public "acceptance of the low bidder, or give public explanation why such was not acceptable."

By letter dated April 15, 2005, we asked the Council to respond to your complaint within ten days. The Council asked for a brief extension of time, which we granted. We received the Council's response on April 29, 2005. By letter dated May 4, 2005, we received additional information from the Council. ¹

¹ In its letter of May 4, 2005, the Council disputed your additional claim that the City did not comply with the public bidding requirements of the municipal code. That issue is outside our jurisdiction under FOIA and is not addressed in this opinion, but the fact that the contract was not publicly bid is relevant to the open meeting issue raised in your complaint..

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According to the Council, “[a]s a result of the direct impact of certain state legislation on the administration of Newark government, it was determined by a majority of the Newark City Council that the City should have a regular and effective voice in Dover in the form of a skilled and experienced lobbyist.” The city publicly solicited candidates and received “several resumes and letters of interest from a number of individuals. The City Manager and staff were provided with the discretion to winnow the number of inquiries down to a ‘short list’ of candidates who would then be interviewed by the Major and City Council.”

That process resulted in two finalists: Joseph F. Fitzgerald of Fitzgerald Consulting, Inc. and Robert L. Maxwell of Maxwell & Associates. The Council noticed a special meeting for March 7, 2005 in accordance with FOIA. Listed on the agenda for that special meeting was “Executive Session re Personnel.” The minutes of the special meeting show that in public session the Council voted to go into executive session, and then returned to public session approximately fifty minutes later. The minutes of the executive session (which the Council provided for our *in camera* review) show that the Council interviewed the two candidates separately.

The Council then voted to amend the agenda to go back into executive session to discuss “personnel issues.” The minutes of the second executive session (which the Council provided for our *in camera* review) show that the Council discussed the comparative qualifications of the two candidates and how effective they could be in advancing the City’s interests as they might be affected by state legislation. The second executive session lasted seven minutes.

The Council contends that it lawfully met in executive session to discuss “an individual

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citizen's qualifications to hold a job," 29 Del. C. §10004(b)(1).² According to the Council,"[t]he clear rationale behind the 'job applicant' exemption is to provide a certain level of privacy to an individual who is simply being considered for a position with a public body and who has not yet been hired or retained. It may be assumed that conducting such an interview under the glare of a public meeting of a public body would impact the breadth and candor of both questions and answers during such an 'interview.'"

Relevant Statutes

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those" authorized by statute for executive session. 29 Del. C. § 10004(a).

FOIA authorizes a public body to meet in executive session to discuss "an individual citizen's qualifications to hold a job or pursue training unless the citizen requests that such meeting be open." Id. § 10004(b)(1).

² The City also invokes FOIA's exception for executive session to discuss personnel matters. See 29 Del. C. §10004(b)(9) (personnel matters "in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open"). The personnel exception does not apply because a contractor is not an employee of a public body. See At'y Gen. Op. 05-IB02 (Jan. 12, 2005).

Legal Analysis

In *Att’y Gen. Op.* 99-IB03 (Apr. 28, 1999), we determined that the town lawfully met in executive session to discuss the qualifications of applicants for the position of town manager. “For sound public policy reasons, job applicants have a right of privacy to information disclosed during the application process, at least until they are hired. ‘[D]isclosure may embarrass or harm applicants who failed to get a job. Their present employers, co-workers, and prospective employers, should they seek new work, may learn that other people were deemed better qualified for a competitive appointment.’” *Att’y Gen. Op.* 99-IB03 (quoting Core v. United States, 730 F.2d 946, 949 (4th Cir. 1984)).

Similarly, in *Att’y Gen. Op.* 05-IB12 (May 9, 2005), we determined that the New Castle County Council lawfully met in executive session to interview the two final candidates for the position of counsel to the Council. “[T]he two final applicants had a reasonable expectation to privacy until such time as the Council voted to hire one of them and extend an offer of public employment.”

In *Att’y Gen. Op.* 02-IB17 (Aug. 6, 2002), we determined that FOIA’s job applicant exemption for executive session did not apply to the hiring of a search consultant. In contrast to an applicant for public employment, the qualifications of an independent contractor “would not ‘likely involve such sensitive matters as to require concealment from an interested public. And the fact that contracts for special services are exempt from bidding requirements highlights the importance of public scrutiny.’” *Att’y Gen. Op.* 02-IB17 (quoting Rowen v. Santa Clara Unified School District, 121 Cal.App.3d 221 (1981)).

In *Att’y Gen. Op.* 05-IB02 (Jan. 12, 2005), we determined that the City of Newark violated

the open meeting requirements of FOIA when the Council met in executive session to review the hourly rates for outside legal counsel. In that case, the City claimed it was authorized to go into executive session based on FOIA's "personnel" exemption for executive session (29 Del. C. §10004(b)(9)). We concluded that the "personnel" exemption did not apply. "[T]he City Solicitor and the Deputy Solicitor are not public employees. Rather, they are independent contractors hired by the city to provide professional legal services."

Like the personnel exemption for executive session, FOIA's job applicant exemption is intended to protect the privacy of individuals, not the members of a public body. It is the right of the individual public employee or prospective employee, therefore, to request "that such a meeting be open." 29 Del. C. §§10004(b)(1), (9). In contrast, other exemptions for executive session are intended to protect the competitive position of the public body in purchasing real estate, in collective bargaining, and in litigation strategy. See 29 Del. C. §§10004(b)(2), (4).

A vendor or independent contractor does not share the same personal privacy concerns as an individual public employee or prospective public employee. When a business bids for work from a public body, it is not applying for a "job" in any common sense meaning of that term. A vendor or contractor has little if any expectation of privacy when marketing its goods or services for sale to a public body (except to the extent the contracting process may require disclosure of trade secrets or confidential financial information, see 29 Del. C. §10002(g)(2)). The experience, reputation, and qualifications of vendors and contractors are subject to constant comparison in the marketplace through advertising and the public bidding process. To construe FOIA to deem them "job applicants" would cloak the decision-making process for the expenditure of most tax monies from public scrutiny, a result clearly inconsistent with the purposes of FOIA.

In Grein v. Board of Education of the School District of Fremont, 343 N.W.2d 718 (Neb. Supr. 1984), the school district met in private to discuss two bids for a boiler contract. The Nebraska Supreme Court rejected the argument that public disclosure of why one of the bidders did not get the contract “would needlessly injure the reputation of the contractor. . . . We believe that the slight discomfort, if any, experienced by [one of the] bidders in the arena of public lettings is far outweighed by the policy favoring openness in the meetings of a public body.” 343 N.W.2d at 721, 724.

Ordinarily, there will be a high degree of transparency in the award of public contracts by virtue of the public bidding laws. The City has informed us that the City Manager waived the public bidding requirements of the municipal code in hiring a lobbyist because of the “unique and unprecedented position involving the provision of professional services.” The “fact that contracts for special services are exempt from bidding requirements highlights the importance of public scrutiny” under FOIA. Rowen, Cal.App.3d at 235.

We believe that FOIA’s job application exemption for executive session applies only when a public body is discussing an individual’s qualifications for public employment. Like the personnel exemption, the job applicant exemption serves “to protect the individual’s reputation, and to establish an environment in which subtle and sensitive matters can be explored in an open and candid manner.” Rowen, Cal.App.3d at 235. These public policies are not furthered by their application to vendors and contractors doing business with a public body.

Conclusion

For the foregoing reasons, we determine that the Council violated the open meeting requirements of FOIA when it met twice in executive session on March 7, 2005 to discuss which of

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two outside firms to retain to provide professional lobbying services. As remediation, we direct the Council to hold a special meeting within thirty (30) days of the date of this letter to re-interview in public session the two final candidates, and to vote in public which lobbying firm to retain. We direct the City Solicitor to notify us in writing within ten (10) days after remediation is perfected.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Malcolm S. Cobin, Esquire
State Solicitor

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cc: The Honorable M. Jane Brady

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